

Utah Real Estate



A publication for Utah's real estate professionals

Michael O. Leavitt, Governor • Theodore "Ted" Boyer, Jr., Division Director

NEWS

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Would I Lie to You?



by Nancy Matthews, Idaho Deputy Attorney General

Courts across the country are finally getting a chance to take their first look at property condition disclosure laws and how they are affecting modern real estate transactions.

Is There a Good Neighbor Warranty Now?

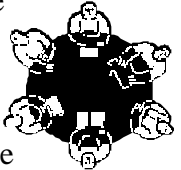
The Sutherlands, who were being transferred out of state, sold their home to Prudential Relocation Company. The Sutherlands had had a long-standing dispute with their next-door neighbors over the neighbors' loud arguments and late night music. In fact, the Sutherlands had called the police about the noise on a number of occasions. However, when the Sutherlands filled out the seller property disclosure form in connection with their sale to Prudential, they answered "No" to a question asking if they were aware of any neighborhood noise problems or other nuisances.

The Shapiros bought the house from Prudential and moved in, blissfully unaware of the habits of their new neighbors. Unfortunately, the Shapiros also found that they did not share the neighbors' taste in late night music and, like the Sutherlands, were unable to resolve the noise problems with these neighbors. So, the Shapiros sued both Prudential and the Sutherlands for money damages and rescission of the sale. The trial court threw out the Shapiro's claim against both Sutherlands and Prudential, reasoning that 1) the Sutherlands did not have any contractual relationship with Shapiro at all, since they sold to Prudential, and 2) Prudential had no knowledge of either the noisy neighbors or the Sutherland's misrepresentations about the noise nuisance. The Shapiros appealed.

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Utah Real Estate Commission Vacancy

After several years of diligent service, the term of Grant Davis, Chair of the Utah Real Estate Commission, expires in June, 1999.



Each Commissioner is appointed by the Governor to a term of four years. The Commission meets at least monthly and receives a modest per diem and costs of travel. The Commission makes administrative rules regarding licensing, education, record keeping, handling of funds by licensees, property management and standards of conduct. The Commission also conducts administrative hearings relating to the conduct of licensees, license applicants, education providers, etc.

Applicants for this vacancy must have an active real estate license, must have at least five years real estate experience and must not reside in Salt Lake, Weber, Summit or Utah counties.

Anyone interested in being considered for an appointment to the Utah Real Estate Commission may contact the Division of Real Estate or the office of the Governor. Applications should be filed by May 1, 1999.

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Would I Lie to You?

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The appeals court saw things differently. The court ruled that the Sutherlands' statutory duty to truthfully fill out the property condition disclosure form extended to the remote purchaser Shapiro, since the Sutherlands had reason to know that the disclosure form they gave to Prudential could be passed on to and relied on by the ultimate purchaser. The fact that the Sutherlands had no privity of contract with the Shapiros did not relieve Sutherlands of responsibility to make accurate and truthful disclosures under the statute. The appeals court then ruled that Prudential was correct in simply forwarding the Sutherlands' property disclosure form to the buyers and that Prudential had no duty to investigate the truthfulness of each of the Sutherlands' disclosures on the form. However, the court also stated that Prudential must remain a party to the lawsuit in case Shapiros were successful in getting the court to rescind the transaction.

The moral of the story? The sellers have a legal, if not a moral, obligation to fill out a seller's property disclosure form truthfully and completely, even if they are selling to a relocation company. The seller's representations, made on that form, extend to and may be relied on, by the ultimate purchaser. In Idaho, the law exempts relocation companies from having to provide seller property disclosure statements to its buyers. However, if a relocation company does pass on a statement filled out by the seller it purchased from, and if the relo company clearly states that it has no independent knowledge of the condition of the property nor of the accuracy of the previous seller's representations, this case might well convince an Idaho court to reach a similar result. *Shapiro v. Sutherland* 1998 WL 333914 (Cal. App. 2 Dist. 1998).

What's a Little Water?

The Fannings were conscientious buyers. Before purchasing their dream home, they read the seller's property disclosure statement and hired their own property inspector. Despite their best efforts to discover any potential problems with the home prior to

the purchase, the Fannings were dismayed to discover during the very first rain that water collected so as to create a small pond on one side of the yard. The listing didn't mention a "water feature." The Fannings pulled out the seller's disclosure form, and sure enough, the sellers had checked "No" in response to a question regarding whether they were aware of any improper drainage on the property. The Fannings sued. The sellers argued that any statement they might have made on the property disclosure form could not be the cause of the Fanning's damages, since the Fannings had hired their own property inspector to check out the property. In other words, the Fannings shouldn't have relied on what was in the disclosure form, and that their hiring of a property inspector somehow superceded any representations made by the sellers on that form. The sellers also creatively argued that their statement in the disclosure form that they were not aware of any improper drainage was merely their opinion and was not an actionable misrepresentation. Maybe it was the photograph that appeared at trial showing the sellers floating in a canoe in a yard pond caused by a rainstorm while they owned the house, but the court didn't buy the seller's argument. The court noted that the property inspection done for the buyers did not include any inspection of the yard or drainage, and furthermore, the buyers testified that they most certainly did rely on the seller's direct representations on the disclosure form. Therefore, the judgment was against the sellers. *Kessler v. Fanning* 953 S.W.. 2d 515 (Tex. App. 1997) Moral of this story: A property inspection may not let sellers "off the hook" when it comes to truthfully and thoroughly completing the seller's property condition form.

Reprinted with permission from Idaho's *The Real Estate*, January, 1999

In Memoriam

The Division of Real Estate expresses condolences to the families of the following real estate licensees who have recently passed away:

Gordon T. Hanna
Wallace L. Richardson

Duck Creek
Ogden

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Div. of Real Estate home page address:
[http://www.commerce.state.ut.us/web/
commerce/re/udre1.htm](http://www.commerce.state.ut.us/web/commerce/re/udre1.htm)

Loan Origination

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types of services normally performed in the origination of a loan include filling out the application, analyzing the prospective borrower's income and debt, pre-qualifying the prospective borrower, educating the prospective borrower in the home-buying and financing process, advising the borrower about different types of loan products available, discussing how closing costs and monthly payments might vary from product to product, collecting financial information, initiating verifications of employment and verifications of deposits, initiating or ordering requests for mortgage and other loan verifications, initiating or ordering appraisals, inspections, or engineering reports, providing disclosures, assisting the borrower in understanding and clearing credit problems, ordering legal documents, determining whether or not the property is located in a flood zone, and participating in the loan closing.

Based on that analysis, HUD will generally conclude that there has not been a violation of RESPA if the real estate professional took the application, performed at least five additional services of those described above and the fee was reasonably related to the market value of the services that were performed.

HUD has been concerned that a fee for steering a customer to a particular lender, which would be prohibited, could be disguised as compensation for counseling-type activities. Therefore, if the real estate professional is providing only counseling-type services to justify a fee from the lender, HUD would look also to see if that counseling was meaningful, and would consider, among other things, whether or not the counseling gave the borrower the opportunity to consider products from at least three different lenders, whether the real estate professional performing the counseling would receive the same compensation regardless of which lender's product was ultimately selected, and whether the payment for the counseling services is reasonably related to the services performed, and not based on the amount of loan business referred to the lender.

In summary, under certain circumstances, it would be permissible for a real estate professional to provide mortgage-loan origination services under federal law, and, by implication, under state law. The real estate professional must be mindful of the prohibition against receiving referral fees in both the federal and state law, and the basis for that prohibition, which is to prevent steering business to a particular mortgage lender for a fee. Finally, HUD has developed a rather detailed policy approach to determining whether or not to bring an enforcement action under RESPA. Until HUD develops an interpretive rule to provide greater guidance on what origination services are compensable under RESPA, one is sailing in rather uncharted waters.

If you have a question about the propriety of providing mortgage loan origination services, you are encouraged to seek competent advice or counsel. This article is only a summary of some of the issues and should not be relied upon for determining whether or not a specific activity is permissible.

"You must learn from the mistakes of others. You can't possibly live long enough to make them all yourself."

--Sam Levenson

TRUST ACCOUNT SEMINAR

The seminar will cover the Administrative Rules for trust accounts established under the Utah Real Estate license law.

Location: 2970 East 3300 South, Salt Lake City

Dates: May 7, June 4, July 9, August 6

Time: 9:00 am to 12:00 noon

Credit: 3 hours continuing education

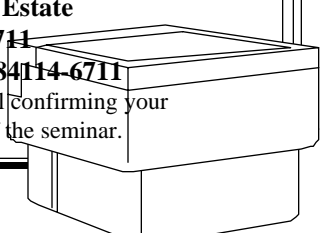
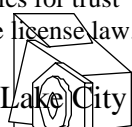
You **MUST PREREGISTER** by sending \$5 with your name, address, phone number and license number to:

Division of Real Estate

PO Box 146711

Salt Lake City, UT 84114-6711

You will receive a phone call confirming your registration the week of the seminar.





Disciplinary Sanctions

BRASHER, GREGORY V., Sales Agent, Salt Lake City. License application granted on probationary status for two years.

BROWN, KENNETH, Principal Broker, Realty Group Armstrong & Company, Sandy. Consented to pay a \$400.00 fine and complete a remedial education course, based on failure to have a written property management agreement and breaching a fiduciary duty by withholding a portion of a rental deposit equal to an amount he claimed the owner of the property owed him for management fees pending the resolution of their dispute over the fees. Mr. Brown and the owner subsequently settled their dispute over the fees and the owner withdrew her complaint. #RE96-06-16.

CLIFTON, LESLIE M., Sales Agent, Huntsville. Ms. Clifton's conditional real estate license was revoked on January 11, 1999 after the criminal background check required of new sales agent revealed that she had failed to accurately disclose a plea in abeyance agreement at the time of application. After a post-revocation hearing, the Commission and the Division found that Ms. Clifton had not intentionally failed to disclose the plea agreement and reinstated her license. #REFP99-01.

COPYAK, JEANETTE, Associate Broker, Ogden Valley Real Estate, Eden. License surrendered effective February 27, 1999 in lieu of continuing to respond to a complaint filed with the Division. Ms. Copyak may not reapply for a new license for at least two years. #RE98-03-09.

COPYAK, FRED, Principal Broker, Ogden Valley Real Estate, Eden. License surrendered effective February 27, 1999 in lieu of continuing to respond to a complaint filed with the Division. Mr. Copyak may not reapply for a new license for at least two years. #RE98-03-08.

CRAMER, STACEY, Sales Agent, Stansbury Park. Ms. Cramer's conditional real estate license was revoked on January 19, 1999 after the criminal background check required of new sales agent revealed that she had failed to accurately disclose a 1992 misdemeanor conviction at the time of application. After a post-revocation hearing, the Commission and the Division found that Ms. Cramer had not intentionally failed to disclose the misdemeanor and reinstated her license on a probationary status for two years. #REFP99-04.

FORD, TED S., Sales Agent, Orem. Application for reinstatement denied, based on 1995 and 1997 criminal convictions, his failure to report those convictions to the Division within 10 days, his failure to disclose the 1995 conviction on his 1996 application for renewal, and the fact that he is still on criminal probation.

GRAY, CHERYL, Sales Agent, formerly with Coldwell Banker Aspen Brook Realty, Vernal. Consented to surrender her license to the Division by February 27, 1999 and not to reapply for three years, based on a real estate transaction in which a phony lease was submitted to her husband's employer. The Grays were actually purchasing a home and not renting. The purpose for the phony lease was to receive a \$500.00 per month rental benefit from the employer. Gray maintains in mitigation that she did not conceive of the idea to use the phony lease and that she was not licensed at the time, although she did subsequently become licensed and the rental subsidy payments continued after she became licensed. #RE98-11-12.

HILTON, M. EDWARD, Inactive Sales Agent, Hooper. Application for reinstatement denied, based on a May, 1998 plea in abeyance to a charge of Possession of Marijuana. If Mr. Hilton successfully completes probation and commits no further violations within the next twelve months, he will be allowed to reinstate.

RENTERIA, JOHN, Sales Agent, Salt Lake City. Mr. Renteria's conditional sales agent license was revoked on February 16, 1999 after the criminal background check required of new sales agents revealed that he had failed to accurately disclose his criminal history on his application for a sales agent license. #REFP99-07.

SCHULTE, DANIEL P., Sales Agent, Layton. Mr. Schulte's conditional sales agent license was revoked on February 8, 1999 after the criminal background check required of new sales agents revealed that he had failed to accurately disclose his criminal history on his application for a sales agent license. #REFP99-05.

SPETH, RICK R., Sales Agent, Logan. Mr. Speth's conditional sales agent license was revoked on February 16, 1999 after the criminal background check required of new sales agents revealed that he had failed to accurately disclose his criminal history on his application for a sales agent license. #REFP99-06.

TOOLEY, SHARLE, Sales Agent, Heber City. Ms. Tooley's conditional sales agent license was revoked on January 11, 1999 after the criminal background check required of new sales agents revealed that she had failed to accurately disclose her criminal history on her application for a sales agent license. #REFP99-02.

WEAVER, KEVIN L., Sales Agent, Layton. Mr. Weaver's conditional sales agent license was revoked on January 19, 1999 after the criminal background check required of new sales agents revealed that he had failed to accurately disclose his criminal history on his application for a sales agent license. #REFP99-03.

Never Say These Things

If you want to be considered a “star” performer, consider this list of “Nevers.” Never say:

- “They didn’t get back to me.” Or, “They are getting back to me.” Both are equally disastrous. Expecting someone to get back to you stops the action. Take the initiative.
- “I thought someone else was taking care of that.” Excuses indicate a roadblock to action. Always ask questions to keep things moving.
- “No one ever told me.” Let a supervisor hear you talk this way very often and you will have made a very clear statement about the way you work. You operate in a tunnel, oblivious to everything that is going on around you.
- “I didn’t have time.” And don’t bother with “I was too busy,” either. If you find yourself saying things like this, you are writing your employment obituary.
- “I didn’t think to ask about that.” An inability to see down the road may indicate that you lack the ability to understand and grasp relationships.



The message in business today is clear. The only measure for success is performance. Whatever the roadblocks, it’s your job to remove them. If not, you’ll be perceived as one of them.

Credit given to the National Society of Environmental Consultants, John R. Graham, *The Environmental Consultant*, Vol. 8, No. 2, Summer 1998

Issue: Completion of Contract Forms vs. Drafting

by Blackwell M. Brogden, Jr.

In their haste to secure a deal, licensees sometimes create a “letter of intent” or “memorandum of understanding” signed by the parties and obligating them to execute a formal contract at a later date. However, no matter what such documents are called, they are often actually **contracts** which must be drafted by an attorney, not a licensee. Real estate licensees may “fill in” preprinted contract **forms** but may not draft contracts or special contract form provisions.

Real estate licensees must:

- Know that any document imposing an obligation between two or more separate persons or entities and supported by consideration is a contract.
- Refer parties to an attorney to have a contract, addendum or special provision drafted when an appropriate form is not available.
- Use only contract forms that comply with Commission rules.

Real estate licensees must NOT:

- Draft any document which binds the parties including
 - ~a “letter of intent” or “memorandum”
 - ~an additional provision or addendum to a contract
 - ~other contracts such as a lease, option, etc.
- Convert documents used in prior transactions into “forms” to be completed for current transactions.
- Delete provisions from forms (electronically generated or otherwise) unless the deletions
 - ~are of specific provisions,
 - ~are made at the direction of the parties,
 - ~are clearly shown on the final document and
 - ~do not result in a contract that is missing a material term.
- Draft atypical, special provisions for insertion in contract forms.

Reprinted with permission from the *North Carolina Real Estate Bulletin*, Vol. 27, Winter 1997, No. 4

remember



You Must Notify the Division Within 10 Days in Writing of--

- a change of personal address;
- a change of business address;
- a change of name;
- a change of personal or business telephone number

Commerce & Y2K



by Douglas C. Borba
Executive Director
Department of Commerce

Since August 1997 the Department of Commerce has been involved in preparations for the new millennium.

Commencing with a complete review of existing computer systems, workflow processes and statutory requirements, each Division has worked to eliminate redundant tasks and design common processes by which all future services to the citizens of Utah may be performed.

This project is nearing completion in the form of a fully integrated "Licensing & Enforcement System" which will be deployed throughout the department during the first half of 1999.

During this period some disruption of services may be experienced as we withdraw staff for training, perform data conversion from existing systems and add new features not previously available to our customers.

Please rest assured that our primary objective throughout this essential transition is to maintain a prompt and efficient service for all of our customers. We appreciate your understanding on those rare occasions when our efforts fall short of your expectations due to the change over.

Y1K (Yes, that's right . . . Y1K)

Canterbury, England. A.D. 999

An atmosphere close to panic prevails today throughout Europe as the millennial year 1000 approaches, bringing with it the so-called "Y1K Bug," a menace which, until recently, hardly anyone had ever heard of. Prophets of doom are warning that the entire fabric of Western Civilization, based as it now is upon monastic computations, could collapse, and that there is simply not enough time left to fix the problem.

Just how did this disaster-in-the-making ever arise? Why did no one anticipate that a change from a three-digit to a four-digit year would throw into total disarray all liturgical chants and all metrical verse in which any date is mentioned? Every formulaic hymn, prayer, ceremony and incantation dealing with dated events will have to be re-written to accommodate extra syllables. All tabular chronologies with three-space year columns, maintained for generations by scribes using carefully hand-ruled lines on vellum sheets, will now have to be converted to four-space columns, at enormous cost. In the meantime, the validity of every official event, from baptisms to burials, from confirmations to coronations, may be called into question.

"We should have seen it coming," says Brother Cedric of St. Michael's Abbey, here in Canterbury. "What worries me most is that 'Thousand' contains the word 'Thou', which occurs in nearly all our prayers, and of course always refers to God. Using it now in the name of the year will seem almost blasphemous, and is bound to cause terrible confusion. Of course, we could always use Latin, but that might be even worse. The Latin word for 'Thousand' is 'mille'...which is the same as the Latin for 'mile'. We won't know whether we're talking about time or distance!"

Stonemasons are already reported threatening to demand a proportional pay increase for having to carve an extra numeral in all dates on tombstones, cornerstones and monuments. Together with its inevitable ripple effects, this alone could plunge the hitherto stable medieval economy into chaos.

A conference of clerics has been called at Winchester to discuss the entire issue but doomsayers are convinced that the matter is now one of personal survival. Many families, in expectation of the worst, are stocking up on holy water and indulgences.

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Processing Delays - You Can Help

With approximately 15,000 licensees currently in Utah, the Division of Real Estate processes huge amounts of paperwork every day. When we receive an incomplete or inaccurate application, renewal, change card, etc., our staff must spend additional time communicating with the applicant or licensee in order to resolve the situation. The extra time spent on inaccurate forms affects the processing times for **all** paperwork.

Before submitting forms to the Division, ***please*** check them for accuracy, completeness, and proper signatures. Just a few minutes spent reviewing your own paperwork could save a lot of time and your tax dollars.

If you have questions, please take the time to read the instructions that are included with all paperwork. If it is still unclear at that point, we'd be happy to answer your questions.